(3)

No. 85-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Illinois

PETITIONER'S BRIEF ON THE MERITS

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Printed by Authority of the State of Illinois (P.O. 33287—70--6-21-86)

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 16, 1985
CERTIORARI GRANTED MARCH 24, 1986

28pp

QUESTION PRESENTED

Whether the exclusionary rule was properly invoked in the lower court where the predicate search was authorized by a presumptively valid statute only later found to violate the fourth amendment.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court presented for review is set forth in the appendix of the Petition for a Writ of Certiorari and reported at *People v. Krull*, 107 Ill. 2d 107, 481 N.E.2d 703 (1985). The unreported November 23, 1983, Order of the Appellate Court of Illinois, First Judicial District, is set forth in the Joint Appendix at pages 22-26. The Report of Proceedings containing the trial court's findings on September 25, 1981, and July 9, 1984, is reproduced at pages 18-21 and pages 27-35 of the Joint Appendix.

JURISDICTION

The opinion of the Illinois Supreme Court was filed on July 17, 1985 and the Petition for a Writ of Certiorari submitted September 16, 1985. The petition was granted by this Court on March 24, 1986. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

United States Constitution, Amendment IV:

> The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

The text of Illinois Revised Statute, Chapter 95½, Section 5-401 (1979), is set forth in its entirety at pages 36-37 of the Joint Appendix.

STATEMENT OF THE CASE

Complaints filed on July 5, 1981, in the Circuit Court of Cook County, Illinois, charged respondent Salvatore Mucerino with one count of possession of a stolen vehicle (J.A. 2) and respondent George Lucas with three counts of possession of a stolen vehicle and one count of possession of a false manufacturer's identification number. (J.A. 9-12) Complaints filed on July 20, 1981, charged respondent Albert Krull with six counts of failure to surrender a certificate of title. (J.A. 3-8)

The facts underlying all charges arose on July 5, 1981, when Detective Leilan K. McNally of the Chicago Police Department made a warrantless entry onto the business premises of the Action Iron and Metal Company for the purpose of performing a records inspection authorized by section 5-401(e) of the Illinois Vehicle Code.[1] The following day, in an unrelated action for injunctive relief filed pursuant to 42 U.S.C. § 1983, the Honorable Milton I. Shadur of the United States District Court for the Northern District of Illinois held that the statute's authorization of searches "at any reasonable time during the night or day" does not sufficiently circumscribe official discretion as to when and whom to search. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill.

[1] Section 5-401(e) provided:

> (e) Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.

Ill. Rev. Stat., ch. 95½, § 5-401(e) (1979) (J.A. 37).

1981). Respondents subsequently filed a motion to suppress evidence based upon this decision. (J.A. 13-17)

At a hearing on the motion before the Honorable Martin F. Hogan, Detective McNally testified that at approximately 10:30 a.m. July 5, 1981, he made a warrantless inspection of the Action Iron and Metal Company's premises as part of his regular inspection duties carried out pursuant to section 5-401(e). (R. 12-14, 18, 24)[2] When he arrived at the scrap yard, the officer noticed tow trucks delivering wrecked vehicles which were purchased by respondent Lucas. McNally identified himself to Lucas as a police officer and asked if the yard was open for business. Lucas replied affirmatively and stated that he was in charge. (R. 21, 25) McNally requested that he be allowed to inspect the company's license and records contained in what is commonly known as the police book. (R. 26) Lucas responded that he could not locate the documents but did produce a yellow pad of paper describing five vehicles which he had purchased. (R. 17, 26)

McNally asked Lucas if he objected to the officer's inspection of vehicles in the yard, to which respondent replied "Go right ahead." (R. 26) McNally proceeded to make a notation of the serial number on all the vehicles he was able to examine. (R. 12, 26) He then checked those serial numbers on his mobile computer and discovered that three of the vehicles had been reported stolen. (R. 11, 12) These vehicles were seized, along with another that had the vehicle identification tag removed. (R. 11)

Lucas was arrested on the scene. (R. 16, 19) Although respondent Mucerino was also present, he was not arrested until some time later. (R. 18, 19) Respondent Krull,

[2] "R." designates the Report of Proceedings held September 25, 1981, on respondents' Motion to Suppress Evidence Illegally Seized.

a licensee of the corporation, was not present on July 5 and could not be located. (R. 10, 11, 17, 18) Pursuant to McNally's request, Krull's attorney later tendered to the officer all the company's pertinent records. (R. 10)

The trial court ruled that respondent Mucerino had standing to object to Detective McNally's search and that respondent Lucas had not given effective consent to search. (J.A. 19, 20) The court further found the inspection to be permissible activity under the statute, but granted the motion to suppress because section 5-401(e) had been declared unconstitutional. (J.A. 20, 21) On the People's appeal to the Appellate Court of Illinois, First Judicial District, the court vacated Judge Hogan's order and remanded the case in light of *Illinois v. Gates*, 462 U.S. 213 (1983), for a determination of whether the search of the scrap yard was conducted in good faith. Because section 5-401(e) had since been amended by the Illinois legislature and portions of Judge Shadur's order in *Bionic* were therefore vacated as moot by the seventh circuit [*Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983)], the court also suggested that Judge Hogan reconsider whether the prior statute was constitutional and whether respondent Mucerino had standing to contest the search. *People v. Krull*, Nos. 81-2621, 81-2622, 81-2623 consol. (1st Dist. Nov. 23, 1983). (J.A. 22-26)

On remand, Judge Hogan reiterated his previous findings that respondent Lucas did not consent to the search, that respondent Mucerino had standing, and that for the reasons stated by the district court in *Bionic*, section 5-401(e) was unconstitutional before being amended. (J.A. 30, 32, 33) On the issue "directed by the Appellate Court as a result of the Gates' Case", the trial court found *Gates* and its discussion of the good faith exception to the exclusionary rule to be irrelevant in the context of warrantless

searches conducted pursuant to statute. (J.A. 32, 34, 35) Accordingly, the original ruling on respondents' motion to suppress remained intact. (J.A. 33)

Judge Hogan's order was affirmed on the People's direct appeal to the Illinois Supreme Court, which held that respondent Lucas did not consent to the search, that good faith reliance on a procedural statute will not cure an otherwise illegal search, and that prior to being amended section 5-401(e) was unconstitutional for the reasons stated by the district court in *Bionic. People v. Krull*, 107 Ill. 2d 107, 481 N.E.2d 703 (1985). Petitioner obtained *certiorari* review of that decision on March 24, 1986.

SUMMARY OF ARGUMENT

A. In *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405 (1984), this Court for the first time recognized a good faith exception to the fourth amendment exclusionary rule, holding that there exists insufficient justification for the suppression of reliable evidence in the prosecution's case-in-chief when an arrest or search was effectuated by law enforcement in objectively reasonable reliance on a subsequently invalidated warrant. Adhering to the reasoning of *Leon*, a good faith exception should also be recognized when police have acted in reasonable reliance on a statute later declared invalid under the fourth amendment. The enactments of state and federal legislatures are presumptively constitutional; officers charged with enforcement of the laws cannot ordinarily be expected to question their validity any more than officers can be expected to question the validity of a duly issued warrant. Particularly where searches or seizures are reasonably conducted pur-

suant to a statute or warrant, the primary purpose of the exclusionary rule, to deter police misconduct, would not be significantly advanced by the costly use of the suppression sanction. Nor will the exclusionary rule's rationale support an attempt to deter legislatures from enacting unconstitutional statutes. These bodies are guarantors of the people's liberty to the same degree as the courts. Adequate incentive to comply with the fourth amendment further exists through serious practical consequences attending the invalidation of a statute independent of evidentiary exclusion.

B. The warrantless inspection of respondent Krull's premises was authorized by a state statute regulating the licensed industry of automotive parts and scrap processors, which Illinois had long subjected to extensive scrutiny. Neither the statute nor its predecessor enacted in the 1930s had been held invalid at the time of the search. Although a federal district court judge later declared the statute in violation of the fourth amendment, even members of the judiciary would appear to be in conflict over the correctness of that ruling. Under these circumstances, there existed no significant reason for the police to question the presumptive validity of the statute when respondent Krull's premises were inspected. Because law enforcement acted in good faith, the exclusionary rule was improperly invoked by the lower court.

ARGUMENT

THE EXCLUSIONARY RULE WAS IMPROPERLY INVOKED IN THE LOWER COURT WHERE THE PREDICATE SEARCH WAS AUTHORIZED BY A PRESUMPTIVELY VALID STATUTE ONLY LATER FOUND TO VIOLATE THE FOURTH AMENDMENT.

Pursuant to a long-standing Illinois statute authorizing the warrantless administrative inspection of business premises occupied by licensed used automobile and parts dealers, a detective of the Chicago Police Department perused inventory of the Action Iron and Metal Company owned by respondent Krull. Although the regulatory statute was subsequently held to violate the fourth amendment, at the time of the inspection there existed no significant reason for the detective to question its validity. Under these circumstances, this Court's decision in *United States v. Leon*, ____ U.S. ____, 104 S.Ct. 3405 (1984), mandates the conclusion that application of the exclusionary rule below was not justified.

A.

Application Of The Exclusionary Rule Is Unwarranted Where A Search Or Seizure Was Conducted In Reasonable Reliance On A Statute Subsequently Ruled Invalid Under The Fourth Amendment.

In *Leon* and its companion case *Massachusetts v. Sheppard*, ____ U.S. ____, 104 S.Ct. 3424 (1984), this Court for the first time recognized a good faith exception to the fourth amendment exclusionary rule, holding that evaluation of the societal costs and benefits in suppressing reliable evidence dictates that the sanction not be applied during the prosecution's case-in-chief where an arrest or a search was effectuated by law enforcement in objectively

reasonable reliance on a subsequently invalidated warrant. Rejection of suppression as an appropriate remedy to enforce fourth amendment rights is even more compelling where a search or seizure was conducted in good faith pursuant to a presumptively valid statute later declared unconstitutional.

It is well-established that the exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). This Court has also recognized that through its interference with the fact-finder's truth seeking function, the rule may operate to ameliorate or nullify the adverse consequences of criminal conduct and thereby "generat[e] disrespect for the law and administration of justice." *Stone v. Powell*, 428 U.S. 465, 490, 491 (1976). Accordingly, invocation of the rule had not been required merely because suppression in a particular context incrementally contributes to its deterrent function. *See, e.g., United States v. Janis*, 428 U.S. 433, 454 (1976) (use in federal civil proceedings of evidence illegally seized by state officials). Rather, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought *most efficaciously* served." *Calandra*, 414 U.S. at 348 (emphasis supplied).

To ascertain the potential benefits served by application of the exclusionary rule where warrants have been secured, *Leon* focused on the sanction's effect on the behavior of individual law enforcement officers or on the policies of their departments. 104 S.Ct. at 3419. In discounting any influence the suppression of evidence may have on judges or magistrates issuing warrants, this Court reasoned that (1) the primary purpose of the exclusion-

ary rule is to deter police misconduct rather than to punish judicial error, (2) no evidence suggests that judges and magistrates are inclined to ignore or subvert the fourth amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion, and (3) there exists no basis for believing that use of the rule will have any significant effect on a neutral judicial officer's decision to issue a warrant. *Id.* at 3418. Each of these considerations applies with equal if not greater force in the context of searches or seizures conducted pursuant to duly enacted state or federal legislation.

The primary purpose of the exclusionary rule is not to punish legislative error, nor is the reckless enactment of unconstitutional statutes "a problem of major proportions." *Id.* at 3418, n.14. Any contrary suggestion would fly in the face of this Court's repeated pronouncements that, particularly where the validity of a statute turns on what is "reasonable" under the fourth amendment, the collective judgment of legislators on the issue is entitled to a strong presumption of constitutionality. *See United States v. Di Re*, 332 U.S. 581, 585 (1948); *United States v. Watson*, 423 U.S. 411, 416 (1976); *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers). *Cf. Payton v. New York*, 445 U.S. 573, 600 (1980) (while a long-standing, widespread practice is not immune from fourth amendment scrutiny, it is not to be lightly brushed aside, particularly "when the constitutional standard is as amorphous as the word 'reasonable', and when custom and contemporary norms necessarily play such a large role in the constitutional analysis."). This Court's willingness to place weight on legislative determinations of reasonableness when resolving substantive fourth amendment issues clearly implies a rejection of any notion that legislatures tend to undermine fourth amendment principles so as to necessitate the use of costly sanctions

such as evidentiary suppression. Indeed, common sense dictates that errant judicial behavior on the part of a single judge or magistrate will occur with more frequency than the enactment of misconceived statutes hammered out by entire legislative bodies which are "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Maher v. Roe*, 432 U.S. 464, 480 (1977) [quoting *Missouri K & T.R. C. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.)].

Nor is there any reason to believe that exclusion of evidence seized pursuant to statute will have a significant deterrent effect on the enactment of legislation contravening the fourth amendment. While the legislative branch might be viewed as more closely aligned with law enforcement than the judiciary, incentive to enact valid laws nevertheless will not arise from the potential exclusion of evidence in particular criminal proceeding. Rather, a legislature's incentive exists in the knowledge that should its statute fail to survive judicial scrutiny,[3] not only will

[3] In *Leon*, this Court observed that reviewing courts have the authority to resolve fourth amendment questions on their merits before turning to considerations of good faith and that it is not likely litigants will be significantly deterred from presenting colorable claims by application of the good faith exception. 104 S.Ct. at 3422, 3423. Particularly in the context of single industry regulatory statutes such as that at issue here (*see* Argument B, *infra*), there is no danger that their constitutionality will become immune from attack. While the search or seizure made pursuant to an individual warrant will typically not be repeated, searches authorized in pervasively regulated industries will by definition occur more frequently and businesses subjected to those searches will likely have the incentive and financial ability to seek declaratory or injunctive relief as did the association of auto yards in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981). Therefore, even more unpersuasive than in *Leon* are the arguments that recognition of a good faith exception "will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state." 104 S.Ct. at 3422.

the condemnation of its actions be highly visible independent of the particular case under review, but the laborious process of legislative creation must begin anew. Although it has been suggested that adoption of a good faith exception will affect the diligence of magistrates issuing warrants, it is not even arguable that a legislature's duty to enact constitutional statutes will come to be perceived by that body as an "inconsequential chore." *Leon*, 104 S.Ct. at 3444 (Brennan, J., dissenting). Therefore, "[i]f exclusion of evidence obtained pursuant to a subsequently invalidated [statute] is to have any deterrent effect, . . . it must alter the behavior of law enforcement officers or the policies of their departments." *Id.* at 3419.

In *United States v. Peltier*, 422 U.S. 531 (1975), this Court held that the policies underlying the exclusionary rule did not warrant retroactive application of its fourth amendment holding in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The Court reasoned first that the deterrent purpose of the rule "necessarily assumes that the police have engaged in willful, or at the very least negligent," unconstitutional conduct. 422 U.S. at 539 [quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)]. Accordingly, evidence obtained from an invalid search should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge," that the search violated the fourth amendment. *Id.* at 542. Second, because the search at issue had been conducted pursuant to long-standing statutory and regulatory authority which had been repeatedly upheld against constitutional attack by the lower courts, law enforcement could not be charged with knowledge of its invalidity. *Id.*

While the fourth amendment retroactivity analysis of *Peltier* appears to have since been modified by this

Court,[4] its suggestion that the exclusionary rule should not be applied to deter objectively reasonable police conduct was reiterated in *Leon*, which found that application of a good faith exception in warrant cases is particularly appropriate because it is the magistrate's responsibility to issue a warrant comporting with the fourth amendment. 104 S.Ct. at 3419, 3420.

Just as in "the ordinary case" an officer cannot be expected to question the propriety of a duly issued warrant (*id.* at 3420), an officer should not generally be required to second-guess the validity of statutes which have been enacted by legislative bodies acting as co-guarantors of the people's liberty. *See* pp. 10, 11 *supra*. As recognized by this Court in *Michigan v. De Fillippo*, 443 U.S. 31 (1979),

> Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to deter-

[4] *Peltier* relied almost exclusively on the policies underlying the exclusionary rule in determining that *Almeida-Sanchez* should not be applied retroactively. 422 U.S. at 535. In *United States v. Johnson*, 457 U.S. 537 (1982), this Court deemphasized consideration of the purpose of a particular constitutional rule and to a great extent embraced Justice Harlan's dissenting opinion in *Desist v. United States*, 394 U.S. 244 (1969), which expressed the view that the Court should strive to formulate retroactivity principles of general applicability, to decide all cases before it in accord with existing constitutional standards, and to treat similarly situated defendants similarly. *Desist*, 394 U.S. at 258, 259. *Johnson* therefore concluded that unless a case is clearly controlled by prior retroactivity precedent, a decision of the Court construing the fourth amendment (at issue there) is to be applied retroactively to all convictions not yet final at the time the decision was rendered. 457 U.S. at 562.

mine which laws are and which are not constitutionally entitled to enforcement.

Id. at 38.

De Fillippo held that where an arrest is made in reasonable reliance on a substantive criminal statute later declared unconstitutional, the fourth amendment is not offended. In finding the decision's consideration of good faith inappropriate to the case at bar, the Illinois Supreme Court correctly noted that *De Fillippo* specifically distinguished between intrusions conducted pursuant to substantive statutes and those effectuated under color of a procedural statute directly authorizing the arrest or search. *People v. Krull*, 107 Ill. 2d 107, 118, 481 N.E.2d 703, 708 (1985). Regardless of the validity of that distinction, however, the lower court failed to recognize the more significant and reasoned distinction later made manifest in *Leon* between substantive fourth amendment decisions and those wherein the applicability of the exclusionary rule as a proper remedy is in issue. *See Leon*, 104 S.Ct. at 3415, n.8. As *Leon* teaches, resolution of the latter question depends solely upon the rule's potential for deterrence in a given context, and *De Fillippo* speaks directly to this point: "To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule." 443 U.S. at 39, n.3.

B.

The Inspection Of Respondent Krull's Premises, Authorized By A Long-Standing State Statute Which Existing Law Did Not Clearly Establish To Be Invalid, Was Conducted In Good Faith.

The criminal charges brought against respondents are predicated upon the July 5, 1981, warrantless entry onto

the business premises of the Action Iron and Metal Company by Detective Leilan K. McNally of the Chicago Police Department. The entry was made pursuant to section 5-401(e) of the Illinois Vehicle Code, which provided:

> (e) Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.

Ill. Rev. Stat., ch. 95½, § 5-401(e) (1979) (J.A. 37).[5]

[5] The trial court initially held that Detective McNally's inspection of the premises was "permissible activity" in accord with the statute (J.A. 20), but later intimated that the search exceeded statutory authority because the detective did not limit his inspection to verifying the accuracy of the only "record" provided him by respondent Lucas at the time, a pad of paper upon which five vehicles were described. (J.A. 29) Inasmuch as all pertinent records of the company were later tendered to McNally at his office by respondent Krull's attorney (R. 10), the trial court apparently questioned whether under the statute the premises search could precede scrutiny of the police book required by section 5-401 to be maintained and made available for inspection at the principal place of business. However, as recognized by the seventh circuit in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983), if the regulatory inspections authorized by the Illinois Vehicle Code are to be credible deterrent, the inspections must be unannounced. *Id.* at 1078. *Cf. Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (Mine Safety and Health Act); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (Gun Control Act). This deterrent function would be rendered ineffective if licensees could preclude immediate premises searches by the simple expedient of failing to tender all existing records at the time they are requested. Had the Illinois Supreme Court not agreed, it would have declined to address the constitutionality of section 5-401(e) particularly where the legislation had since been amended. *See Lindberg v. Zoning Board of Appeals*, 8 Ill. 2d 254, 133 N.E.2d 266 (1956).

The following day, in an unrelated action for injunctive relief filed pursuant to 42 U.S.C. § 1983, the Honorable Milton I. Shadur of the United States District Court for the Northern District of Illinois held section 5-401(e) to violate the fourth amendment. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981). Judge Shadur agreed with state officials there that the nature of the used auto parts business in Illinois justifies regulation by statutes which might not be amenable to effective enforcement if impromptu warrantless searches were not authorized. Accordingly, the fourth amendment does not preclude such inspections where " 'the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.' " *Id.* at 585 [quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)].

Judge Shadur then pointed out that the administrative scheme approved in *Dewey* "*required* inspection of *all* mines" pursuant to a specific schedule, whereas that struck down by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), merely authorized premises inspections at reasonable times. 518 F. Supp. at 585. The judge concluded that, as in *Barlow's*, the Illinois statute's authorization of searches "at any reasonable time during the night or day" did not sufficiently circumscribe official discretion as to when and whom to search. *Id.*[6]

[6] The Illinois Supreme Court agreed. *People v. Krull*, 107 Ill. 2d 107, 116, 481 N.E.2d 703, 707 (1985). Before the district court's ruling could be reviewed by the seventh circuit on appeal, the statute was amended to require that inspections be made "at any time that business is being conducted or work is being performed . . . or when the licensee or a representative of the licensee, other than a mere custodian or watchman, is present", that they not exceed 24 hours in length, and that they occur no more than six

(Footnote continued on following page)

Assuming the district court's ruling to have been correct, Detective McNally cannot be properly charged with knowledge that section 5-401(e) was constitutionally flawed. Before initiation of the present prosecution, the Illinois state courts had had only two occasions to address the reasonableness of searches directed at the premises of dealers licensed to buy and sell used motor vehicles or vehicle parts. In *People v. Levy*, 370 Ill. 82, 17 N.E.2d 967 (1938), and *People v. Allen*, 407 Ill. 596, 96 N.E.2d 446 (1950), the Illinois Supreme Court held the searches constitutional because the Uniform Motor Vehicle Anti-Theft Act then in effect specifically provided that dealers must maintain various records and, as a condition of licensing, "shall be deemed to have granted authority to any peace officer to examine such records, and any motor vehicle, or parts or accessories in his place of business at any reasonable time during the day or night." Ill. Rev. Stat., ch. 95½, § 87(a) (1937). This search provision is the predecessor to section 5-401(e). *Northern Illinois Automobile Wreckers and Rebuilders Ass'n v. Dixon*, 75 Ill. 2d 53, 387 N.E.2d 320 (1979).

Twenty years later in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), this Court found that because regulation of the liquor industry had strong historical roots, Congress held the power to make criminal a liquor licensee's failure to permit a warrantless inspection of his inventory. *Colonnade*'s emphasis on an industry's pervasive regulation was reiterated in *United States v. Biswell*, 406 U.S. 311 (1972), where legislation providing

[6] *continued*
times in any six-month period. Ill. Rev. Stat., ch. 95½, § 5-403(4), (5), and (7) (1983). The seventh circuit found these amendments to adequately limit the intrusiveness of the search and official discretion in its implementation. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1080 (7th Cir. 1983).

for the warrantless inspection of premises upon which firearms are imported, manufactured, collected or dealt was ruled constitutional. In support of its determination that these administrative searches are not unreasonable under the fourth amendment, this Court reasoned that the searches furthered urgent governmental interests and that licensees choosing to engage in extensively regulated industries do so with the knowledge that their records and inventory will be subject to inspection. *Id.* at 315, 316. Significantly, neither the statute at issue in *Colonnade* [26 U.S.C. § 5146(b)] nor that addressed in *Biswell* [18 U.S.C. § 923(g)] mandated that inspections be made or circumscribed the timing of the searches other than to require that they be conducted "during business hours."

This Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), appeared to characterize the reaffirmed *Colonnade-Biswell* exception to the warrant requirement as one based upon the effective consent granted by the entrepreneur in a particular industry as a result of its long history of governmental regulation. *Id.* at 312, 313. *See also id.* at 336-38 (Stevens, J., with whom Blackmun, J., and Rehnquist, J., join, dissenting). Subsequent to *Barlow's*, this or a similar rationale was held to support warrantless administrative searches in a variety of contexts.[7] However, in an opinion issued two weeks before

[7] *See, e.g., United States v. New England Grocers Supply Co.*, 488 F. Supp. 230 (D. Mass. 1980) (food industry); *United States v. Kaiyo Maru No. 53*, 503 F. Supp. 1075 (D. Alaska 1980) (commercial fishing industry); *People v. Firstenberg*, 92 Cal. App. 3d 570, 155 Cal. Rptr. 80 (1979) (nursing home industry); *State v. Barnett*, 389 So.2d 352 (La. 1980) (used property industry). None of the statutes addressed in these cases mandated inspection. Nor did they limit the timing of inspection other than to require that it be "reasonable." While the massage parlor inspection statute at issue in *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978), did

(Footnote continued on following page)

the search conducted by Detective McNally, this Court in *Donovan v. Dewey*, 452 U.S. 594, 603 (1981), clarified that the ultimate concern is the pervasiveness and regularity of the statutory scheme. *Id.* at 606. *See also id.* at 607 (Stevens, J., concurring).

As recognized by the seventh circuit in *Bionic*, it is undisputed that Illinois has long subjected the business of automotive parts and scrap processors to extensive scrutiny through licensing and other regulatory requirements. 721 F.2d at 1079. Further, the State has a strong interest in the prevention of stolen motor vehicle sales which is served by the Motor Vehicle Code's record-keeping provisions and its authorization of frequent, impromptu warrantless inspections for the purpose of verifying the accuracy of those records required to be maintained. *Id.* at 1077, 1078. It is therefore clear that prior to *Dewey* the Illinois statute was a candidate for automatic invocation of the *Colonnade-Biswell* exception.[8]

[7] *continued*
require that the premises be inspected "periodically", the fifth circuit's reliance upon *City of Indianapolis v. Wright*, 371 N.E.2d 1298 (Ind. 1978), suggests that the mandatory nature of the statute was not deemed material. Similarly, although inspections pursuant to New York's Vehicle Dismantlers Law may be conducted only during "usual business hours", the limitation was not noted by the court in *People v. Tinneny*, 99 Misc. 2d 962, 417 N.Y.S.2d 840 (1979), which instead looked to the facts of the specific case for a determination of reasonableness. *See also People v. Easley*, 90 Cal. App. 3d 440, 153 Cal. Rptr. 396 (1979) (vehicle dismantling industry).

[8] At the time of the search conducted here, at least five states had enacted statutes authorizing warrantless inspections directed at the used automobile and automotive parts industry which neither mandated nor limited the frequency or hours of inspection. *See* Ariz. Rev. Stat., § 28-1307(c) (1952); Colo. Rev. Stat., § 42-5-105(1) (1963); Del. Code, Title 21, § 6717 (Supp. 1977); Hawaii Rev. Stat., § 289-6 (1976); Tex. Veh. Code Ann., § 6687-2 (1977).

Even if Detective McNally may be charged with knowledge of so recent an opinion, perusal of *Dewey* does not compel a finding that section 5-401(e) contravenes the fourth amendment. While *Dewey* did emphasize the mandatory schedule statutorily imposed upon inspections conducted pursuant to section 103(a) of the Federal Mine Safety and Health Act, 30 U.S.C. § 813(a) (1976 ed., Supp. III), it did not suggest that the statutes at issue in *Colonnade* and *Biswell* were rendered unconstitutional because they did not require inspections at specified intervals. And while the statutes addressed in those cases did limit inspections to reasonable business hours, that upheld in *Dewey* placed no cap on the frequency of inspection, nor did it limit the hours of inspection. Under these circumstances, it was reasonable for peace officer McNally to believe that the Illinois statute's presumptive validity remained intact despite its failure to mandate inspections or circumscribe official discretion in determining the reasonableness of an inspection's frequency or hours. Indeed, even members of the post-*Dewey* judicial branch have expressly or impliedly refused to find these alleged inadequacies fatal to similar statutes authorizing the warrantless administrative search of business premises. *See, e.g., United States v. Jamieson-McKames Pharmaceuticals*, 651 F.2d 532 (8th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982) [construing the Food, Drug and Cosmetic Act, 21 U.S.C. § 374(a)]; *United States v. Gel Spice Co.*, 601 F. Supp. 1214 (E.D.N.Y. 1985) (same); *Kim v. Dolch*, 219 Cal. Rptr. 248 (Cal. App. 4th Dist. 1985) (construing city ordinance regulating massage parlors); *Peterman v. Coleman*, 764 F.2d 1416 (11th Cir. 1985) (construing city ordinance regulating pawn brokers).

In *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405, 3421, 3422 (1984), this Court noted that although reliance on a warrant will normally suffice to establish

law enforcement's good faith, the suppression of evidence remains an appropriate remedy where the officer has acted "in reckless disregard of the truth," the magistrate has "wholly abandoned" his judicial role, or where the warrant's particularity or probable cause foundation is so deficient as to render official belief in its validity "entirely" unreasonable. Without question there exists in the present case no like cause for Detective McNally to have known that the inspection of respondent Krull's business premises was constitutionally infirm. The search, made pursuant to a long-standing state statute which did not clearly contravene the fourth amendment, was conducted in good faith. Application of the exclusionary rule, which would not only hinder the truth-seeking function of the factfinder but effectively preclude the prosecution of respondents altogether, cannot be justified.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that the decision of the Illinois Supreme Court suppressing evidence be reversed.

Respectfully submitted,

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